

**Before the
NATIONAL LABOR RELATIONS BOARD**

In the Matter of)	
)	
Chicago Mathematics and Science Academy)	
Charter School, Inc.,)	
)	
Employer,)	
)	
and)	Case No. 13-RM-1768
)	
Chicago Alliance of Charter Teachers and)	
Staff, IFT, AFT, AFL-CIO,)	
)	
Union.)	

BRIEF OF THE UNION

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BRIEF OF THE UNION

INTRODUCTION

This case is before the Board on review of a Decision and Order of the Regional Director of Region 13 finding that the Employer, a public charter school, is exempt from Board jurisdiction as a political subdivision of the State of Illinois. The facts in this case demonstrate that the Employer is a political subdivision exempt from coverage under the Act within the meaning of Section 2(2) of the Act. The Board should therefore affirm the Regional Director's order dismissing the petition.

STATEMENT OF FACTS

Employer's Petition

On July 29, 2010, the Chicago Mathematics and Science Academy Charter School, Inc. (CMSA) filed its RM petition in this matter. Tr. 6; Board Ex. 1(a). CMSA filed such petition after the Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL-CIO (Union) filed a majority interest representation petition with the Illinois Educational Labor Relations Board (IELRB) seeking to represent a unit of all full-time and part-time teachers, counselors, and social workers employed by the Employer. Tr. 6.

The Illinois Charter Schools Law

The Illinois Charter Schools Law (105 ILCS 5/27A-1, *et seq.*) was enacted in 1996 and is part of the Illinois School Code (105 ILCS 5/1-1, *et seq.*). Such law sets forth the following declaration of legislative intent:

In authorizing charter schools, it is the intent of the General Assembly to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating children within the public school

system. The General Assembly seeks to create opportunities within the public school system of Illinois for development of innovative and accountable teaching techniques.

105 ILCS 27A-2(c).

The Illinois Charter Schools Law provides that:

- “A charter school shall be a public, nonsectarian, nonreligious, non-home based, and non-profit school. A charter school shall be organized and operated as a nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois.” 105 ILCS 5/27A-5(a).
- “The General Assembly does not intend to alter or amend the provisions of any court-ordered desegregation plan in effect for any school district. A charter school shall be subject to all federal and State laws and constitutional provisions prohibiting discrimination on the basis of disability, race, creed, color, gender, national origin, religion, ancestry, marital status, or need for special education services.” 105 ILCS 5/27A-4(a).
- “No charter shall be granted under this Article that would convert any existing private, parochial, or non-public school to a charter school.” 105 ILCS 5/27A-4(c).
- “The governing body of a charter school shall be subject to the Freedom of Information Act and the Open Meetings Act.” 105 ILCS 5/27A-5(c). The Illinois Freedom of Information Act (5 ILCS 140/1, *et seq.*) applies solely to “public bodies” in Illinois, provides that the records maintained by such public bodies are “public records,” and requires public bodies to make their records available to any requesting person for inspection and copying. 5 ILCS 140/3. The Illinois Open Meetings Act (5 ILCS 120/1, *et seq.*) applies only to “public bodies” and requires that meetings of public bodies be open to the public. 5 ILCS 120/1.02, 2.

- A charter school shall comply with all provisions of the Illinois Educational Labor Relations Act (IELRA). 105 ILCS 5/27A-5(g). The IELRA, 115 ILCS 5/1, *et seq.*, is a comprehensive public sector bargaining statute for educational employees in Illinois. Section 3 of the IELRA protects the right of educational employees to organize, join unions, and engage in concerted activity. 115 ILCS 5/3. Sections 7 and 8 of the IELRA provide for bargaining unit determinations and certification of representatives by the IELRB. 115 ILCS 5/7, 8. Section 10 of the IELRA requires educational employers to bargain with exclusive representatives of their employees. 115 ILCS 5/10. Sections 14 and 15 of the IELRA set forth unfair labor practices and unfair labor practice procedures. 115 ILCS 5/14, 15.

- “[A] bargaining unit of charter school employees shall be separate and distinct from any bargaining units formed from employees of a school district in which the charter school is located.” 105 ILCS 5/27A-7(a)(11).

- A charter school is subject to and must comply with the provisions of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101, *et seq.*). 105 ILCS 5/27A-5(g)(3). The Local Governmental and Governmental Employees Tort Immunity Act provides immunities and defenses to “local public entities and public employees” from liability arising “from the operation of government.” 745 ILCS 10/1-101.1(a).

- “A charter school shall comply with all applicable health and safety requirements applicable to public schools under the laws of the State of Illinois.” 105 ILCS 5/27A-5(d).

- A charter school must comply with the provisions of the School Code providing for criminal history records checks and checks of the Statewide Sex Offender Database and Statewide

Child Murderer and Violent Offender Against Youth Database of applicants for employment. 105 ILCS 5/27A-5(g)(1).

- Instructional employees must be certified in accordance with the School Code or possess alternative qualifications specified in the Charter Schools Law. The Law requires that specified percentages of teachers in Chicago charter schools hold teaching certificates. 105 ILCS 5/27A-10(c).

- “Enrollment in a charter school shall be open to any pupil who resides within the geographic boundaries of the area served by the local school board, provided that the board of education in a city having a population exceeding 500,000 may designate attendance boundaries” for some charter schools if it determines that such attendance boundaries “are needed to relieve overcrowding or to better serve low-income or at-risk students.” 105 ILCS 5/27A-4(d).

- “If there are more eligible applicants for enrollment in a charter school than there are spaces available, successful applicants shall be selected by a lottery.” 105 ILCS 5/27A-4(h).

- “A pupil who is suspended or expelled from a charter school shall be deemed to be suspended or expelled from the public schools of the school district in which the pupil resides.” 105 ILCS 5/27A-4(h).

- A charter school is prohibited from charging tuition except as provided in the School Code. 105 ILCS 5/27A-5(e). The School Code allows school districts to charge tuition only to non-resident pupils. 105 ILCS 5/10-20.12a.

- A charter school must comply with the provisions of the School Code regarding discipline of students in public schools. (105 ILCS 5/24-24 and 5/34-84A) 105 ILCS 5/27A-5(g)(2).

- A charter school must comply with the provisions of the Illinois School Student Records Act (105 ILCS 10/1, *et seq.*). The Illinois School Student Records Act regulates student records in public – but not private – schools. 105 ILCS 5/27A-5(g)(6).

- The charter school must comply with the provisions of the School Code requiring public schools to prepare and provide to the public school report cards showing the school's performance as measured by State and local standards. (105 ILCS 5/10-17a) 105 ILCS 5/27A-5(g)(7).

- For purposes of the School Code provisions regarding State aid to public schools, pupils enrolled in a charter school shall be included in the pupil enrollment of the school district within which the pupil resides and the charter school shall maintain accurate daily attendance records. 105 ILCS 5/27A-11(a).

- A charter school contract is to provide for funding for the charter school that is no less than 75% and no more than 125% of the school district's per capita student tuition multiplied by the number of students residing in the district who are enrolled in the charter school. 105 ILCS 5/27A-11(b).

- A charter school is entitled to receive from a school district the proportionate share of state and federal resources generated by students with disabilities or staff serving them at the charter school. 105 ILCS 5/27A-11(c).

- A proposed charter school contract between a school district and the governing body of a charter school must be approved by the Illinois State Board of Education (State Board), and the State Board must approve any material revisions to a previously certified charter school contract. 105 ILCS 5/27A-6.

- Before a charter school can be established, a charter school proposal must be submitted to the local school board and the State Board. 105 ILCS 5/27A-7(a). Such proposal must include:
 - » the name of the proposed school (105 ILCS 5/27A-7(a)(1));
 - » the age or grade range, areas of focus, minimum and maximum numbers of pupils to be enrolled, and “any other admission criteria that would be legal if used by a school district” (105 ILCS 5/27A-7(a)(2));
 - » a description of and address of the physical plant in which the school will be located (105 ILCS 5/27A-7(a)(3));
 - » the mission statement of the charter school, “which must be consistent with the General Assembly’s declared purposes” (105 ILCS 5/27A-7(a)(4));
 - » the goals, objectives and pupil performance standards to be achieved by the charter school (105 ILCS 5/27A-7(a)(5));
 - » a description of the charter school’s educational program, pupil performance standards, curriculum, school year, school days, and hours of operation (105 ILCS 5/27A-7(a)(7));
 - » a description of the charter school’s plan for evaluating pupil performance, the types of assessments that will be used to measure pupil progress towards achievement of the school’s pupil performance standards, the time line for achievement of those standards, and the procedures for taking corrective action in the event that pupil performance at the charter school falls below those standards (105 ILCS 5/27A-7(a)(8));
 - » “[e]vidence that the terms of the charter as proposed are economically sound for both the charter school and the school district, a proposed budget for the term of the charter, [and] a description of the manner in which an annual audit of the financial and administrative operations

of the charter school, including any services provided by the school district, are to be conducted” (105 ILCS 5/27A-7(a)(9));

- » a description of the governance and operation of the charter school (105 ILCS 5/27A-7(a)(10));

- » “[a]n explanation of the relationship that will exist between the charter school and its employees, including evidence that the terms and conditions of employment have been addressed with affected employees and their recognized representative, if any” (105 ILCS 5/27A-7(a)(11));

- » information regarding insurance coverage (105 ILCS 5/27A-7(a)(12)); and

- » a description of how the charter school plans to meet the transportation needs of its pupils and a plan for addressing the transportation needs of low-income and at-risk pupils. 105 ILCS 5/27A-7(a)(13).

- A charter school renewal proposal must contain:

- » a report on the progress of the charter school in achieving the goals, objectives, pupil performance standards, content standards, and other terms of the initial approved charter proposal (105 ILCS 27A-9(b)(1)); and

- » “a financial statement that discloses the costs of administration, instruction, and other spending categories for the charter school that is understandable to the general public and that will allow comparison of those costs to other schools or other comparable organizations.” 105 ILCS 27A-9(b)(2).

- A charter may be revoked if the local school board or State Board determines that the charter school:

» “[c]ommitted a material violation of any of the conditions, standards, or procedures set forth in the charter (105 ILCS 27A-9(c)(1));

» “[f]ailed to meet or make reasonable progress toward achievement of the content standards or pupil performance standards identified in the charter (105 ILCS 27A-9(c)(2));

» “[f]ailed to meet generally accepted standards of fiscal management (105 ILCS 27A-9(c)(3)); or

» “[v]iolated any provision of law from which the charter school was not exempted.”

105 ILCS 27A-9(c)(4).

Other Illinois Statutory Provisions

Illinois Educational Labor Relations Act

The “governing body of a charter school established under Article 27A of the School Code” is included within the definition of a public “educational employer” subject to the jurisdiction of the IELRB under the IELRA. 115 ILCS 5/2(a).

Illinois Pension Code

A charter school is included within the definition of an “employer” for purposes of the provisions of the Illinois Pension Code providing for a Public School Teachers’ Pension and Retirement Fund – Cities Over 500,000 Inhabitants (40 ILCS 5/17-105) and “any educational, administrative, professional, or other staff employed in a charter school operating in compliance with the Charter Schools Law who is certified under the law governing the certification of teachers” is included within the definition of “contributor, member or teacher” under such provisions (40 ILCS 5/17-106).

Illinois School Code

A charter school is included within the definition of a “school district” under provisions of the Illinois School Code defining the regulatory duties of the Illinois State Board of Education. 105 ILCS 5/2-3.25a.

Chicago Mathematics and Science Academy Charter School

CMSA was founded in 2003 for the purpose of applying to the Chicago Public Schools (CPS) to open a charter school in Chicago. In accordance with the requirement of the Charter Schools Law that a charter school be organized as a “nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois” (105 ILCS 5/27A-5(a)), CMSA is organized as an Illinois nonprofit corporation. Tr. 12-14; Er. Ex. 1. In 2004, CMSA was granted a charter to operate a charter school in Chicago, and entered into a charter agreement with CPS for a five-year term from July 1, 2004, through June 30, 2009. Er. Ex. 8, pp. 1-2. In accordance with the requirement in its charter agreement, CMSA has a board of directors consisting of a minimum of five members. Tr. 63-4.

CMSA operates a single school, the Chicago Mathematics and Science Academy Charter School, located at 7212 North Clark Street in Chicago. Tr. 37-8, 60. CMSA is able to operate such school because of the charter granted it by CPS. Without such charter, CMSA would not be able to operate the school as a charter school in Illinois. Tr. 60. Although CMSA has had a contractual relationship with Concept Schools, a management organization, since 2008 (Tr. 10, 18-19), CMSA, and not Concept Schools, employs the teachers who work at the school. Tr. 19-20, 25. CMSA currently employs approximately 50 employees, including approximately 35 teachers. Tr. 55.

In September 2009, CMSA submitted a charter school renewal application to CPS. Tr. 47-8; Er. Ex. 9. CPS conducted an evaluation of CMSA, including classroom observations; meetings with teachers, parents and students; meetings with CMSA's board of directors; and public hearings, before approving a renewal of CMSA's charter. Tr. 45-6, 83-4. CMSA's current charter agreement with CPS is effective from July 1, 2009, through June 30, 2014. Tr. 46, 68-9; Er. Ex. 8.

The charter agreement provides that CMSA shall operate a school known as "Chicago Mathematics and Science Academy Charter School." Er. Ex. 8, p. 2. The charter agreement establishes a maximum student enrollment number. Er. Ex. 8, pp. 2-3.

The charter agreement between CPS and CMSA also provides that:

- CPS may establish attendance boundaries for the school and CMSA must adhere to any such attendance boundaries. Er. Ex. 8, p. 3.
- CMSA must conduct a lottery and establish a student waiting list in accordance with detailed specified procedures. Er. Ex. 8, p. 3.
- CMSA may not involuntarily transfer students out of its school. Er. Ex. 8, p. 3. See also Tr. 77-8.
- CMSA must provide services to homeless children at the same level that CPS provides such services. Er. Ex. 8, p. 11.
- CMSA is required to pursue, make reasonable progress toward and document student performance standards in compliance with an Accountability Plan that is made part of the charter agreement and in compliance with the School Code. Er. Ex. 8, pp. 4, 17, 31 (Ex. D). The Accountability Plan provides that CMSA will be evaluated annually on per-pupil performance indicators and financial management/compliance indicators. Er. Ex. 8, Ex. D, p. i. The data

generated regarding CMSA's relative performance under the Accountability Plan is used in charter renewal decisions. Er. Ex. 8, Ex. D, p. iv; Tr. 82-3, 92.

- The curriculum must be consistent with CMSA's charter application, and CMSA must give CPS notice of any material changes in the curriculum. Er. Ex. 8, p. 4. CMSA's charter renewal application (Er. Ex. 9) is made part of the charter agreement. Tr. 48-9; Er. Ex. 8, Exhibit A, p. 28. As required by CPS's renewal application requirements, such renewal application includes detailed information about CMSA's curriculum, student testing, teacher retention, teacher evaluation, instructional strategies, and professional development. Tr. 48-9; 97; Er. Ex. 9.

- CMSA must either adopt a student disciplinary code subject to CPS's approval or follow the CPS disciplinary code. Er. Ex. 10, pp. 4-5.

- Students may be expelled from CMSA only pursuant to procedures specified in the charter agreement, and CMSA must provide detailed factual information regarding any expulsions to CPS. Er. Ex. 8, p. 5.

- CMSA shall identify students from non-English-speaking backgrounds through a CPS home language survey and provide bilingual education services or English Language Learner (ELL) services to which CPS students are entitled. Er. Ex. 8, p. 6.

- CMSA must submit its academic year calendar to CPS. Er. Ex. 8, p. 6.

- In addition to complying with federal and state laws and constitutional provisions as set forth in the Charter Schools Law, CMSA must comply with all federal and state orders and agreements applicable to CPS, including desegregation orders, orders regarding special education, orders regarding bilingual education, compliance agreements, and other agreements with the United States Department of Education and other federal and state agencies. Er. Ex. 8, p. 8.

- CMSA must provide CPS with a current list of its employees and with certification or qualification evidence with respect to its teachers. Er. Ex. 8, p. 9.

- CPS shall distribute funds to CMSA quarterly based on per capita tuition payments for students enrolled at CMSA. The payments to CMSA are conditioned on submission by CMSA of required reports pertaining to student names and addresses and all submissions and documentation set forth in the compliance chart compiled by the CPS Office of New Schools. Er. Ex. 8, p. 12.

Documentation which CMSA must submit to CPS pursuant to CPS's compliance chart includes:

1. the school calendar;
2. a list of CMSA's board members;
3. a list of board of directors' meeting dates, times and locations;
4. copies of board meeting minutes;
5. a detailed budget;
6. quarterly statements showing revenues and actual expenses;
7. a financial/fiscal policies handbook;
8. a financial and compliance audit;
9. a list of employees and results of criminal background checks;
10. teacher qualification data;
11. an election to use CPS special education staff or to hire its own staff;
12. a Title I program design;
13. a school occupancy permit;
14. student enrollment and attendance data;

15. lottery information;
16. CMSA's student code of conduct or an election to use CPS's code of conduct;
17. student discipline data; and
18. documentation of student suspensions and expulsions.

Tr. 69-76; Un. Ex. 1, p.1.

The compliance chart also requires that CMSA submit either to CPS or to the State Board state and federal reports required of Chicago public schools, including:

1. Title I reporting forms;
2. state school report card data, including information on parent participation, truancy, class size, time distribution, financial information, and teacher service record;
3. state testing verification;
4. English Language Learner program information; and
5. parent/guardian transportation reimbursement information.

Un. Ex. 1, p. 2.

CMSA's charter agreement with CPS further provides that:

- CPS distributes to CMSA state aid (Supplemental General State Aid, or SGSA) and federal Title I funds based on submission by CMSA to CPS of eligibility data in connection with such funds. Er. Ex. 8, p. 13.

CMSA Principal Ali Yilmaz testified that of a \$5.6 million budget, all but \$120,000 in private fund raising and grants comes from public funds. Tr. 38-9, 67. Of that, \$4.5 million is per-pupil funding which CMSA receives from CPS. CMSA receives \$7,213 per pupil for the school year, paid in four installments pursuant to the charter agreement. Tr. 38-9. CMSA receives some additional

funds from CPS because it does not use a CPS building. Tr. 67. CMSA also receives state and federal funds from CPS. CMSA receives federal Title I funds, which are paid to schools which have at-risk students who qualify for free and reduced lunch. To receive such funds, CMSA must show that it maintains a program to meet the needs of such students by submitting a Title I program application to CPS. Tr. 38-9, 68, 73. CMSA receives federal Title II funds, which are given for teacher professional development purposes. Tr. 38-9, 68. CMSA also receives state general aid and state funds for students who are English Language Learners. Tr. 38-9. CMSA is entitled to receive such federal and state funding pursuant to the terms of the Charter Schools Law and CMSA's charter agreement with CPS. Tr. 67.

CMSA's charter agreement with CPS further provides that:

- CPS may make deductions for delinquent employee contributions to the Chicago Teachers Pension Fund from CPS's quarterly payments to CMSA. Er. Ex. 8, p. 14. CMSA teachers, pursuant to the Illinois Pension Code, are participants in the Chicago Teachers Pension Fund and CMSA sends the required nine percent contributions directly to the Fund. Tr. 80-1.

- CMSA must submit to CPS quarterly and annual budgets. Er. Ex. 8, p. 12.

CMSA Principal Ali Yilmaz testified that CMSA submits its annual and quarterly budget to CPS and that CPS has requested clarification of numbers in the budget submitted. Tr. 69-70, 89, 93-4. The budget must be submitted in accordance with a CPS template which requires the inclusion of certain specified information, including revenues and expenditures by category. Tr. 92-3.

CMSA's charter agreement with CPS further provides that:

- CMSA must provide enrollment data and daily student attendance data, Individualized Educational Plan (IEP) data and ELL data to CPS by electronic submission through CPS's IMPACT electronic student information system, to which CMSA is given access. Er. Ex. 8, p. 16.

CMSA has access to CPS's IMPACT electronic student information system. CMSA is required to enter daily student attendance into the IMPACT system because, according to CMSA Principal Ali Yilmaz, "that's how the district manages the students' attendance." Tr. 64, 66. Yilmaz testified that CMSA is required by its Accountability Plan to meet certain attendance percentages and that such attendance percentages are tracked by CPS based on the information CMSA enters into the IMPACT system. Tr. 65-6. CMSA is also required to enter information regarding any student transfers into the IMPACT system. Tr. 66. The student attendance data in the IMPACT system as of certain cut-off dates forms the basis for CPS's determination of the per-pupil funding amounts due to CMSA. Tr. 66-7. CMSA also accesses and manages student IEP and ELL records in the IMPACT system. Tr. 64-5.

CMSA's charter agreement also provides that:

- CPS may withhold funds from CMSA in the event of a material violation of the charter agreement. Er. Ex. 8, p. 16.
- CMSA shall administer standardized tests as provided in CPS's policies and shall participate in state assessments required of public schools by the School Code. Er. Ex. 8, p. 17.
- CMSA shall grant reasonable access to CPS to allow CPS to conduct site visits for the purpose of evaluating the operations and performance of the charter school. Er. Ex. 8, p. 18.

- CMSA must provide services and accommodations to students with disabilities in accordance with federal law, CPS's procedural manual on educating children with disabilities in Chicago Public Schools, federal court orders applicable to children with disabilities in Chicago Public Schools, and all service bulletins issued by CPS. CPS shall reimburse CMSA for the salary and benefits of special education teachers based on CPS's special education staffing formulas and the student's IEP. CMSA may elect to furnish its own special education clinicians to provide student support services or may elect to have CPS furnish special education clinicians to serve CMSA's students with disabilities. Clinicians required by a student's IEP shall be reimbursed at CPS's allocation percentage. CPS shall notify CMSA of the number of special education teachers, paraprofessionals, and clinicians needed in the charter school based on the students enrolled at the charter school as shown by the records entered into the CPS IMPACT system. Any special education teachers, paraprofessionals, and clinicians hired by CMSA must have the proper qualifications, Illinois certificates and/or licenses. CPS shall also provide necessary additional resources, including assistive technologies, required for special education students. Er. Ex. 8, pp. 18-19; Tr. 84-5.

Ali Yilmaz testified that several CPS employees, including a nurse, a speech therapist, and a social worker, come to CMSA to provide services to CMSA students. CPS-employed special education teachers formerly provided services to CMSA students at CMSA, but CMSA now employs its own special education teachers. CPS currently allocates to and reimburses CMSA for up to seven special education teachers based on the CMSA students identified as requiring special education services. Tr. 60-3.

The CMSA charter agreement further provides that:

- Any school management contracts entered into by CMSA must have prior approval from CPS and prior certification from the State Board. Er. Ex. 8, p. 19.
- The charter may be revoked upon fourteen days' notice if CMSA fails to comply with the Charter Schools Law; commits a material violation of the charter school agreement, including the Accountability Plan; fails to meet or make reasonable progress toward achievement of pupil performance standards identified in the agreement or in the Accountability Plan; fails to meet generally accepted standards of fiscal management; or materially violates any provision of law from which CMSA is not exempted. Er. Ex. 8, p. 20. See also Tr. 93, 95.
- Material amendments to the agreement must be approved by the State Board. Such material amendments include the addition of new grades, an increase in enrollment capacity, and a move to a new attendance center. Er. Ex. 8, p. 22.

Regional Director's Decision and Order

The Regional Director found that CMSA is a political subdivision exempt from coverage under the Act within the meaning of Section 2(2) of the Act and therefore ordered that the petition be dismissed.

ARGUMENT

Under *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971), an entity is a political subdivision exempt from the Act's coverage under Section 2(2) if it is either: (1) created directly by the state so as to constitute a department or administrative arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. The Regional Director found that CMSA is a political subdivision under both prongs of *Hawkins County*. In reaching such conclusion, the Regional Director properly analyzed the facts in this case in accordance with applicable Board precedent. An examination of the actual operations and characteristics of the Employer establishes that CMSA is a statutorily-created public charter school and is therefore a political subdivision of the State of Illinois exempt from Board jurisdiction under the first prong of *Hawkins County*. Moreover, the facts in this case demonstrate that CMSA is administered by individuals who are responsible to public officials or to the general electorate and is therefore an exempt political subdivision under the second prong of *Hawkins County*. The Board should therefore affirm the Regional Director's decision and order dismissing the Employer's RM petition.

I. CMSA is a statutorily-created public charter school and is therefore an exempt political subdivision under the first prong of *Hawkins County*.

Under *Hawkins County*, "Federal, rather than state, law governs the determination" of "whether an entity created under state law is a 'political subdivision' of the State and therefore not an 'employer' subject to the Act." 402 U.S. at 602-3. However, "State law declarations and interpretations are given careful consideration." *Hawkins County*, 402 U.S. at 602. The Board

examines “the actual operations and characteristics” of the employer in determining whether the employer is an exempt political subdivision. *Hawkins County*, 402 U.S. at 604. In *Hawkins County*, the Supreme Court looked carefully at the Tennessee statute establishing utility districts in determining whether the actual operations and characteristics of a utility district made it a political subdivision. 402 U.S. at 605-6.

In *Hinds County Human Resource Agency*, 331 NLRB No. 186 (2000), the Board found that:

We are mindful that in *Hawkins*, the Supreme Court found such state determinations are not controlling in ascertaining whether an entity is a political subdivision. However, the Court also found that such determinations are worthy of careful consideration, and the Board has found the state’s characterization of an entity to be an important factor in determining the more specific issue of whether the Employer was created so as to constitute a department or administrative arm of government.

Hinds County Human Resource Agency, 331 NLRB No. 186 (footnote omitted). *See also New York Institute for the Education of the Blind*, 254 NLRB No. 85 (1981).

In *Hinds County Human Resource Agency*, the Board found that an agency administering low-income assistance programs in Mississippi was exempt from Board jurisdiction under the first prong of *Hawkins County*. The Board in that case relied in part on its finding that the state enabling statute evinced an intent that agencies such as the employer in that case be operated under local governmental control and on its finding that the State of Mississippi viewed the employer as an exempt political entity. 331 NLRB 1404. The Board in *Hinds County Human Resource Agency* also relied on its findings that there was significant government control over the employer’s budget, auditing, and operations; that the employer received virtually all of its funding from the state, county, and federal government; that the employer’s audit was reviewed by the Hinds County Board of Supervisors; that

such board had the power to call the employer in for clarification regarding its audit; that the employer had to report on its progress toward goals; and that the employer's employees were eligible to participate in the state retirement system. 331 NLRB 1404.

In *Jervis Public Library Association, Inc.*, 262 NLRB No. 145 (1982), the Board found the employer to be an administrative arm of the state in providing educational services to the public and thus exempt from Board jurisdiction under the first prong of *Hawkins County*. The employer in that case was incorporated under the laws of the State of New York and was governed by a board of trustees elected by the dues-paying members of the employer. The day-to-day activities of the employer were overseen by a director who reported to the board. The employer set its own policies regarding sick leave, personal leave, meal breaks, discipline, hiring, firing, and wages. The employer entered into an annual contract with the City of Rome, New York, to provide library services. The Board, in finding the employer to be a political subdivision under the first prong of *Hawkins County*, relied on its findings that although the employer received some funds from memberships, fines, and the sale of copying services and supplies, the City of Rome and the State of New York exercised significant control over the employer's expenditures by reason of the required submission of an annual budget prior to funding approval; the employer was operated pursuant to regulations promulgated by the State's commissioner of education; and the employer's employees participated in the state retirement system. 262 NLRB 1386. The Board found that the employer was "an 'administrative arm' of the State in providing educational services to the public." 262 NLRB 1386 (footnote omitted).

In *New York Institute for the Education of the Blind*, the Board found an educational and residential care facility for blind children to be an administrative arm of the State of New York even

though the institute operated under the overall direction of its own board of managers, a body of private citizens elected annually with no input from the State, and even though the institute received private funds. The Board found that the State exercised significant control over the institute's expenditures by reason of required submission of budgets in advance of the fiscal year and the applicability of state audit procedures and that the institute's employees participated in the state employee retirement system. The Board found that the institute was "an 'administrative arm' of the State, in providing educational services for the handicapped." In *Association for the Developmentally Disabled*, 231 NLRB No. 121 (1977), the Board found a mental health services agency that was incorporated as a nonprofit corporation to be an exempt political subdivision under the first prong of *Hawkins County* despite the fact that the agency had its own board of directors whose members themselves selected new board members. The Board found that the agency was created by the State of Ohio to fulfill a county's statutory obligation to provide mental health services and received most of its funding from governmental sources.

In *Charter School Administration Services, Inc.*, 353 NLRB No. 35 (2008), the Board asserted jurisdiction over an employer that was an education management organization (EMO) which operated a Michigan charter school under a contract with an entity holding a charter. The employer in that case, Charter School Administration Services, was a for-profit corporation that provided educational management services to charter schools in several states. It had a school management contract with the entity holding the charter, the Academy of Waterford. The Academy had been granted the charter by Bay Mills Community College. The Board, in determining that it had jurisdiction over the employer in *Charter School Administration Services*, directed its inquiry at the

operations of the employer, “which itself is not a public charter school,” and not at the operations of the entity holding the charter.

Here, the evidence shows that CMSA was created in 2003, seven years following the enactment of the Illinois Charter Schools Law. CMSA was formed and exists for the purpose of operating a Chicago charter school. CMSA is able to operate a Chicago charter school only through its charter agreement with CPS, which agreement was approved by the State Board. If CPS decided not to renew or to revoke CMSA’s charter, CMSA could not operate a charter school in Chicago. Pursuant to the Charter Schools Law, CMSA is a public school subject to federal and state laws and constitutional provisions prohibiting discrimination. CMSA is almost entirely funded by CPS and by federal and state funds that pass through CPS, and CMSA’s budget and financial audit must be submitted to and are subject to scrutiny and questioning by CPS.

Pursuant to the provisions of both the Charter Schools Law and the IELRA, CMSA is a public educational employer subject to and required to comply with the provisions of the IELRA, a comprehensive state public sector collective bargaining law applicable to educational employers and employees. Under the Illinois Pension Code, a charter school is included within the definition of employer for purposes of the Chicago Teachers Pension Fund, and CMSA must ensure that its teachers who are certified participate in such pension fund. CMSA is subject to and must comply with the Local Governmental and Governmental Employees Tort Immunity Act, which provides immunity to public entities and public employees from liability arising from the operation of government. CMSA is subject to the Illinois Freedom of Information Act and the Illinois Open Meetings Act, both of which apply to public bodies.

CMSA must comply with the Illinois School Student Records Act, which regulates student records in public, but not private, schools. CMSA must enroll all students within the attendance boundaries designated by CPS for its school subject to a lottery and waiting list and cannot charge tuition to students residing within the school district. CMSA must comply with CPS's responsibility to provide a free public education to students regardless of their status as being homeless or requiring special education services. The Charter Schools Law provides that a student who is suspended or expelled from a charter school is deemed to be suspended or expelled from the public schools, and CMSA therefore acts on behalf of CPS when it suspends or expels a student.

The evidence thus established that CMSA is not simply a contractor subject to government oversight but is part of the public school system of the State of Illinois. While CMSA is a Section 501(c)(3) corporation with its own board of directors, an examination of CMSA's actual operations shows that CMSA is an administrative arm of the State in providing educational services to the public. Under applicable Board precedent, the facts in this case compel a finding that CMSA was created directly by the State of Illinois so as to constitute a department or administrative arm of the government. The Regional Director thus correctly found that CMSA is a political subdivision within the meaning of the first prong of *Hawkins County*.

II. CMSA is administered by individuals who are responsible to public officials or to the general electorate and is therefore an exempt political subdivision under the second prong of *Hawkins County*.

In determining whether an entity is an exempt political subdivision under the second prong of *Hawkins County*, the Board looks at whether the entity's policy making officials are directly accountable to public officials or to the general public. *Rosenberg Library Association*, 269 NLRB

No. 197 (1984). The Board has found entities to be political subdivisions even though they are operated by board members who are not appointed by or subject to removal by public officials or the general electorate. *See Rosenberg Library Association* [employer's board of trustees selected by existing board members]; *New York Institute for the Education of the Blind* [employer operated by board members who are private citizens and who are appointed with no input from the State]; *Association for the Developmentally Disabled* [employer a nonprofit corporation with a board of directors composed of individuals who themselves select new board members].

The Board also considers whether the entity possesses attributes commonly associated with public status. *Aramark Corp. v. NLRB*, 156 F. 3d 1087, 1093 (10th Cir. 1998), *vacated in part on rehearing en banc*, 179 F. 3d 872 (10th Cir. 1999). The Board examines factors bearing on an entity's relationship to a state, including whether the individuals who administer the entity are appointed by or subject to removal by public officials; whether the employer is publicly funded; whether the employer's expenditures are subject to any public financial reporting and auditing strictures; whether the employer carries out day-to-day management responsibilities free from or subject to oversight; and whether the employer is governed by public record or open meeting requirements. *Regional Medical Center at Memphis*, 343 NLRB No. 48 (2004); *Research Foundation of the City University of New York*, 337 NLRB No. 152 (2002).

In *Regional Medical Center at Memphis*, the Board found an entity engaged in operating a hospital and medical clinics to be administered by individuals who were responsible to public officials. In so finding, the Board relied on findings that the employer's annual budget was subject to approval by the county; the employer was required to have a public audit and to file an annual financial report to the county; the employer was required to make its facility available to all county

residents who were in need regardless of their financial status; meetings of the employer's board of directors were subject to the state open meetings act; the number and selection of the employer's board of directors were subject to appointment by the county; and the employer was funded by the county. The employer in that case was found to be administered by individuals who were responsible to public officials even though the employer operated its facility independently on a day-to-day basis. 343 NLRB 346.

In *Rosenberg Library Association*, the Board found the employer, which operated a library, to be an exempt political subdivision. The library's board of trustees was established pursuant to the terms of a private will, and successor trustees were selected by remaining members of the board of trustees. The employer was nonetheless found to be an exempt political subdivision based on the Board's finding that the employer was administered by individuals who were responsible to public officials or the general electorate. The Board relied on its findings that: the employer operated under state library regulations; the employer was heavily dependent on city, county, state, and federal tax moneys as sources for operating funds; the employer was answerable to the city for its expenditures of revenues; the employer was required to submit a line-item budget annually for approval by the county; the employer operated the library as a public facility to serve the needs of city and county residents; and the library was part of the Houston Area Library System, which established certain standards for employee qualifications, staffing, hours, and funding.

In *Research Foundation of the City University of New York*, the Board found a non-profit educational corporation not to be an exempt political subdivision where the employer received no publicly appropriated funds and where the employer submitted financial reports to the state voluntarily but was not statutorily mandated to submit such reports. 337 NLRB 965. In *Cape*

Girardeau Care Center, 278 NLRB No. 143 (1986), the Board, in finding a nursing home not to be an exempt political subdivision under the second prong of *Hawkins County*, found that the employer's board of directors was not accountable to public officials or to the general public, that the employer was not a county nursing home, that the county provided no funds or other support to the employer, that the employer determined its own fee schedules and budgets and was not required to submit such documents to the county, that the county had no control over the employer's operations, and that the employer's employees were not covered by the county's pension or health insurance plans.

Here, CMSA, under its charter agreement, must maintain and submit student attendance records to CPS on a daily basis, and CMSA's entitlement to receive per-pupil funding from CPS is contingent on its submission of such records. CMSA must submit its quarterly budgets and annual financial audit to CPS. CMSA must follow a curriculum consistent with its charter agreement and cannot make material changes in such curriculum without approval of CPS. CMSA must either follow the CPS student discipline code or a different code approved by CPS. CMSA must identify students requiring services provided to students from non-English-speaking backgrounds in accordance with CPS policy and the School Code. CMSA must submit its school calendar to CPS. CMSA must admit all students within the school district subject to a lottery and waiting list, in accordance with CPS procedures. CMSA must provide services to homeless students to the same extent that such services are provided by CPS. CMSA is prohibited from involuntarily transferring students out of its school. CMSA acts on behalf of CPS when it expels students. CMSA must administer standardized tests in accordance with CPS policies and the School Code, must grant access to CPS to allow CPS to evaluate its school, and must demonstrate reasonable progress toward

achievement of pupil performance standards set forth in the charter agreement and the Accountability Plan.

CMSA's charter may be revoked if it fails to comply with the Charter Schools Law; commits a material violation of the charter school agreement, including the Accountability Plan; fails to meet or make reasonable progress toward achievement of pupil performance standards identified in the agreement or in the Accountability Plan; fails to meet generally accepted standards of fiscal management; or materially violates any provision of law from which CMSA is not exempted.

In *Charter School Administration Services*, the Board found an employer that operated a charter school not to be an exempt political subdivision under the second prong of *Hawkins County*. While the Board found that the individuals who administered the employer in that case were not appointed by or subject to removal by public officials, the Board, in finding the employer not to be a political subdivision, also relied on its findings that: (1) the employer was not subject to the Michigan Open Meetings Act; (2) the employer was not subject to the Michigan Freedom of Information Act; (3) the employer had no direct reporting requirements to the State; (4) the employer was not required to submit a financial audit to the State; (5) the employer was not required to submit its budget to the State for review; (6) the employer did not directly receive any public funds; and (7) the employer's employees did not enjoy any government immunity.

Here, CMSA is not an EMO or subcontractor of a charter school as was the case in *Charter School Administration Services*, but rather is itself the charter holder.¹ In *Charter School Administration Services*, the Board assumed for purposes of its decision, without deciding, that the charter holder in that case was itself an exempt political subdivision. *Charter School Administration Services* at fn. 15. Moreover, the facts in this case are distinguishable from the facts in *Charter School Administration Services* in several respects. CMSA holds a charter granted by CPS and approved by the State Board of Education. CMSA, pursuant to the Charter Schools Law, is part of the Illinois public school system. Pursuant to both the Charter Schools Law and the IERLA, CMSA is a public educational employer required to comply with and subject to the IELRA. CMSA, pursuant to the Charter Schools Law, is a public body subject to the Illinois Open Meetings Act and the Illinois Freedom of Information Act. Under its charter agreement, CMSA is required to submit to CPS its board of directors meeting dates, agendas, and minutes. CMSA is required to submit detailed quarterly budgets, showing actual revenue and expenditures, and an annual financial audit to CPS, and CPS has asked for clarification regarding the budgets submitted by CMSA. Virtually all of CMSA's funds are public funds received by CMSA directly from CPS. Most of such funds are per-pupil funds based on student enrollment as entered by CMSA directly into the CPS IMPACT

1 Whether a subcontractor of instructional services of an Illinois charter school is a political subdivision exempt from Board jurisdiction is not at issue in this case. Pursuant to amendments to the IELRA effective January 1, 2010, an "educational employer" subject to the IELRA includes not only "the governing body of a charter school established under Article 27A of the School Code" but also "a subcontractor of instructional services of a . . . charter school established under Article 27A of the School Code." 115 ILCS 5/2(a). In *Instituto del Progreso Latino*, Case No. 13-RM-1771 (December 30, 2010), and *Pilsen Wellness Center*, Case No. 13-RM-1770 (January 3, 2011), the Regional Director found subcontractors of instructional services of a charter school to be exempt political subdivisions under the second prong, but not under the first prong, of *Hawkins County*.

electronic student information record system. Such funds also include other CPS, state, and federal funds which are available to Chicago public schools. CMSA, pursuant to the Charter Schools Law, is subject to the Local Governmental and Governmental Employees Tort Immunity Act, which provides immunity to local public entities and public employees from liability arising from the operation of government. CPS determines not only the amount of funding allocated to CMSA but also whether CMSA's charter will be renewed, put on probation, or revoked, and CMSA's reporting requirements to CPS include daily accountability reports, academic progress oversight, and required teacher credentials.

Given CPS's oversight of CMSA's budget, CPS's funding to CMSA, and CMSA's reporting accountability requirements, CMSA's board of directors, although not appointed by or subject to removal by public officials, are nonetheless accountable to CPS to such an extent that CMSA's governing body is responsible to public officials or to the general electorate. The Regional Director thus correctly found that CMSA is a political subdivision exempt from Board jurisdiction under the second prong of *Hawkins County*.

CONCLUSION

For the foregoing reasons, the Employer is a political subdivision exempt from Board jurisdiction. The Regional Director's Decision and Order dismissing the RM petition should therefore be affirmed.

Respectfully submitted,

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Dated: March 11, 2011

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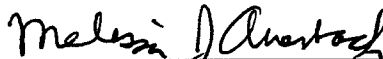
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CERTIFICATE OF SERVICE

Melissa J. Auerbach, an attorney, hereby certifies that she caused a true and accurate copy of the foregoing **Brief of the Union** to be served upon the following by electronic mail on this 11th day of March 2011.

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